MASCON RINOTA SDN BHD & ORS v. RINOTA CONSTRUCTION SDN BHD

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
MOHAMAD ARIFF YUSOF JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: W-02-2373-10-2012]
30 MARCH 2016

COMPANY LAW: *Members' rights – Minority shareholders – Action brought under s. 181 of Companies Act 1965 – Whether oppressive acts to shareholder's interest existed – Whether shareholder barred from directly relying on losses of company to seek relief – Whether proceedings should be brought in name of company by way of derivative action under s. 181A of Companies Act 1965 – 'Reflective loss principle' – Whether remedies under s. 181 of Companies Act 1965 should be granted to shareholder*

COMPANY LAW: *Members' rights – Minority shareholders – Action brought under s. 181 of Companies Act 1965 – Allegation of oppressive acts to shareholder's interest – Delay in filing petition – Whether amounted to acquiescence – Whether court should deny relief to interested party who sat on his rights*

This was an appeal against the orders of the High Court after the hearing of a petition brought pursuant to s. 181 of the Companies Act 1965 ('CA'), whereby the court had principally ordered a buyout of the petitioner's minority shares in a joint venture company. The petitioner and the second respondent (Mascon Sdn Bhd) had in early 1995 agreed to carry out a construction business through a joint-venture company, the first respondent (Mascon Rinota Sdn Bhd) ('the company'). The issued and paid up capital in the company was held in the following proportions: RM300,000 shares for the second respondent and RM200,000 shares for the petitioner. The petitioner's narrative was that in a discussion preceding the setting up of the joint venture business, there was an understanding that at least five construction projects would be made available to the company, although admittedly the immediate objective was to carry out two projects in Malacca namely the Casa Lago Condominium Project and the Harbour Club Project. The petitioner's specific complaints herein arose from the claimed 'understanding' that the further three projects allegedly promised were not secured or awarded to the company and that even in the case of Casa Lago and Harbour Club projects, the contracts that were obtained by the company were the result of a competitive tender exercise. The thrust of the petitioner's contention was that the second respondent, as the majority shareholder, had failed to honour the understanding and the expectations of the petitioner for a long term collaboration through the joint venture. The petitioner also submitted that there were monies recoverable or due to the company and/or that the finances of the company as drawn up did not reflect the true

A and fair position of the company's financial state resulting from such inadequacies in accounting matters. The issues that arose were (i) whether those facts amounted to 'oppressive acts' or 'conduct in disregard' to the petitioner's interest such as would be sufficient to warrant the granting of any relief under s. 181 of the Companies Act 1965; and (ii) whether the existence
B of those facts *ipso facto* meant that the remedies under s. 181 Companies Act 1965 should be granted to the petitioner as was done by the High Court.

Held (allowing appeal with costs)
Per Varghese George JCA delivering the judgment of the court:

C **(1)** The question of delay in filing the petition was of paramount importance in any consideration of the exercise of the court's discretion under s. 181 of the CA. Herein, this petition was only filed in 2006, *ie*, ten years after those matters complained of had first occurred. Acting without expediency to protect or further one's rights when an alleged breach or violation of such right arose amounted to acquiescence, meaning
D acceptance or consent to that situation. The court should deny relief to an interested party who had sat on his rights and accepted tacitly such practices or decisions adopted by a company in its business affairs over time, but who now wished to advance matters related to or arising therefrom as a grievance for relief under s. 181 of the CA. (paras 22, 23
E & 29)

(2) The petitioner *qua* shareholder of the company was seeking for a buyout of the petitioner's shares by, not just the second respondent, but others who were not members of the company. It was trite that relief to be allowed under s. 181 of the CA was discretionary to be determined by
F the court upon equitable principles, inclusive of, the conduct of the parties taken in its totality. The petitioner here was also restricting the relief that was being sought to a forced buyout of their shares in the company which, admittedly for all intents and purposes, was a dormant entity as at the date the petition was filed. (paras 24 & 25)

G **(3)** There is a well-established principle in corporate law that bars a shareholder from directly bringing or relying on 'losses' of the company to seek relief for himself unless by way of derivative action. This was known as the 'reflective loss principle'. The principle applied where the shareholder's alleged loss was merely a reflection of the company's loss,
H such as where the shareholder's loss was a diminution in the value of his shares as a result of those alleged wrong to the company. In such situations, recovery by the shareholder of the loss he suffered was precluded, as this would mean making the wrongdoer liable for the same wrong twice over. (para 34)

I **(4)** The recourses available to the petitioner having such complaints (of loss caused to the company) was by way of derivative action brought under s. 181A of the CA to recover first monies due to the company and/or

effect appropriate corrections to the company's financial statements. Another avenue that was open to the petitioner was to go for outright winding up of the company on just and equitable grounds. In the latter event, the liquidator is empowered to examine the company's account, investigate wrong doings, rectify errors in accounting and even bring needful proceedings against those that had caused the 'losses' to the company (ss. 300, 303, 304, 305 and 306 of the CA) including recovery action against delinquent officers or shareholders of the company. (para 39)

(5) There was no legal or sustainable basis, for the exercise of the court's discretion under s. 181 of the CA, to allow the petition and make the orders for a reassessment of the company's financial records/state and thereafter for a buyout of the petitioner's shares in the company by the second, fourth, fifth, sixth and seventh respondents. This appeal, therefore, warranted appellate intervention. (para 40)

Bahasa Malaysia *Headnotes*

Ini adalah rayuan terhadap perintah Mahkamah Tinggi selepas perbicaraan petisyen di bawah s. 181 Akta Syarikat 1965 ('AS'), di mana mahkamah memerintahkan pembelian kuasaan saham minoriti pempetisyen dalam sebuah syarikat usaha sama. Pempetisyen dan responden kedua (Mascon Sdn Bhd) pada awal tahun 1995 bersetuju untuk menjalankan perniagaan pembinaan melalui satu syarikat usaha sama, responden pertama (Mascon Rinota Sdn Bhd) ('syarikat'). Modal berbayar syarikat tersebut diagihkan seperti berikut: RM300,000 saham untuk responden kedua dan RM200,000 saham untuk pempetisyen. Naratif pempetisyen adalah bahawa semasa perbincangan sebelum penubuhan perniagaan usaha sama, terdapat satu persefahaman bahawa lima projek pembinaan akan dibekalkan kepada syarikat, walaupun objektif segera adalah untuk melaksanakan dua projek di Melaka iaitu Projek Casa Lago Condominium dan Projek Harbour Club. Aduan spesifik pempetisyen di sini berbangkit daripada dakwaan 'persefahaman' bahawa tiga projek lain yang dijanjikan dijamin atau diawardkan kepada syarikat dan dalam kes projek Casa Lago dan Harbour Club, kontrak-kontrak yang diperolehi oleh syarikat adalah akibat latihan tender kompetitif. Hujahan utama pempetisyen adalah bahawa responden kedua sebagai pemegang saham majoriti gagal menghormati persefahaman dan harapan pempetisyen untuk kerjasama jangka panjang melalui usaha sama. Pempetisyen juga menghujahkan bahawa wang yang boleh didapatkan semula atau hutang pada syarikat dan/atau kewangan syarikat yang disediakan tidak mencerminkan kedudukan yang benar dan saksama keadaan kewangan syarikat disebabkan kekurangan dalam hal-hak perakaunan. Isu-isu yang dibangkitkan adalah (i) sama ada fakta-fakta tersebut berjumlah kepada 'perbuatan menindas' atau 'kelakuan pengabaian' kepentingan pempetisyen sehingga mewajarkan pemberian apa-apa relif di bawah s. 181

AS; dan (ii) sama ada kewujudan fakta-fakta *ipso facto* bermaksud remedi-remedi s. 181 AS harus diberikan kepada pempetisyen seperti yang dilakukan oleh Mahkamah Tinggi.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Persoalan kelewatan memfailkan petisyen adalah penting dalam mempertimbangkan pelaksanaan budi bicara mahkamah di bawah s. 181 AS. Di sini, petisyen hanya difailkan pada tahun 2006, iaitu sepuluh tahun selepas perkara-perkara yang diadukan pertama kali berlaku. Tanpa bertindak cepat untuk melindungi hak seseorang atau meneruskan hak seseorang apabila satu pelanggaran atau pencabulan hak sedemikian berlaku berjumlah kepada keakuran, iaitu penerimaan atau persetujuan kepada keadaan itu. Mahkamah harus menafikan relif kepada pihak berkepentingan yang duduk di atas haknya dan mendiam diri menerima amalan-amalan dan keputusan-keputusan yang diguna pakai oleh syarikat dalam urusan perniagannya dari masa ke masa, tetapi sekarang ingin memajukan perkara-perkara berhubungan atau berbangkit sebagai satu rungutan untuk relif di bawah s. 181 AS.

(2) Pempetisyen *qua* pemegang saham syarikat menuntut untuk belian kuasaan saham-saham pempetisyen, bukan hanya dari responden kedua, tetapi juga dari pihak-pihak yang bukan ahli syarikat. Adalah matan bahawa relif yang dibenarkan di bawah s. 181 AS adalah budi bicara yang akan ditentukan oleh mahkamah berdasarkan prinsip-prinsip saksama, termasuk, tingkah laku pihak-pihak diambil secara keseluruhan. Pempetisyen di sini juga menyekat relif yang dituntut untuk memaksa belian kuasaan saham-saham dalam syarikat, yang diakui bagi semua maksud dan tujuan, adalah entiti yang tidak aktif pada tarikh petisyen difailkan.

(3) Terdapat satu prinsip terkemuka dalam undang-undang korporat yang menghalang pemegang saham daripada membawa atau bergantung kepada 'kerugian' syarikat bagi menuntut relif untuk dirinya kecuali melalui tindakan derivatif. Ini dikenali sebagai 'reflective loss principle'. Prinsip ini diguna pakai apabila kerugian yang didakwa oleh pemegang saham hanya mencerminkan kerugian syarikat, di mana kerugian yang dialami pemegang saham adalah pengurangan dalam nilai sahamnya akibat dakwaan kesalahan kepada syarikat. Dalam keadaan ini, pemulihan kerugian yang dialami pemegang saham adalah dihalang, kerana ini akan bermaksud pesalah bertanggungjawab ke atas kesalahan yang sama untuk kali kedua.

(4) Rekursa yang tersedia untuk pempetisyen yang mempunyai aduan sebegini (kerugian syarikat) adalah melalui tindakan derivatif di bawah s. 181A AS untuk mendapatkan balik wang yang terhutang kepada

syarikat dan/atau kesan pembetulan yang sesuai kepada pernyata kewangan syarikat. Satu lagi saluran yang terbuka kepada pempetisyen adalah untuk menggulungkan syarikat atas alasan yang adil dan saksama. Dalam acara terdahulu, pelidikuasi diberikan kuasa untuk memeriksa akaun-akaun syarikat, untuk menyiasat apa-apa kesalahan yang telah dibuat, memperbetulkan kesilapan dalam perakaunan dan juga membawa prosiding yang diperlukan terhadap mereka yang telah menyebabkan 'kerugian' pada syarikat (ss. 300, 303, 304, 305 dan 306 AS) termasuk tindakan pemulihan terhadap pegawai bermasalah atau pemegang-pemegang saham syarikat.

(5) Tiada asas undang-undang atau yang mampan, bagi melaksanakan budi bicara mahkamah di bawah s. 181 AS, untuk membenarkan petisyen dan membuat perintah untuk penilaian semula rekod/keadaan kewangan syarikat dan untuk belian kuasaan saham pempetisyen dalam syarikat oleh responden kedua, kelima, keenam dan ketujuh. Rayuan ini, oleh itu mewajarkan campur tangan rayuan.

Case(s) referred to:

In Re Jermyn Street Turkish Baths Ltd [1971] 1 WLR 1042 ***(refd)***

Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & 13 Ors [1993] 1 LNS 32 HC ***(refd)***

Johnson v. Gore Wood & Co [2002] 2 AC 1 ***(refd)***

Prudential Assurance Co Ltd v. Newman Industries Ltd (No 2) [1982] 1 Ch 204 ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(refd)***

Re Senson Auto Supplies Sdn Bhd [1987] 1 LNS 110 HC ***(refd)***

Scottish Co-Operative Wholesale Society Ltd v. Meyer [1959] AC 324 ***(refd)***

Townsing Henry George v. Jenton Overseas Investment Pte Ltd (In Liquidation) [2007] 2 SLR 597 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 181(1)(a), (2), 181A, 300, 303, 304, 305, 306

Companies Act (Cap 50) [Sing], ss. 216(2)(c), 216A

Other source(s) referred to:

Walter Woon on Company Law, 3rd edn, p 581

For the appellants - Prem Ramachandran; M/s Kumar Partnership

For the respondent - WSW Davidson (Karen Ng Yueh Ying with him); M/s Azman Davidson & Co

[Editor's note: For the High Court judgment, please see Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors [2012] 1 LNS 802 (overruled).]

Reported by Suhainah Wahiduddin

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JUDGMENT

Varghese George JCA:

[1] This appeal was against the orders granted by the High Court after the hearing of a petition brought pursuant to s. 181 of the Companies Act 1965 (CA) , often referred to as an 'oppression petition'. The court had principally ordered a buyout of the petitioner's minority shares in a joint venture company. The terms of the orders issued are reproduced here:

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(a) that the 2nd, 4th, 5th to 7th Respondents jointly and severally purchase the shares owned by the Petitioners in the 1st Respondent at such price and terms determined by this Honourable Court after making all necessary adjustments to the accounts of the company to compensate for the acts and oppression of the Respondents;

(b) that the 2nd and 4th Respondents pay, or cause its subsidiaries or associated companies to pay, the 1st Respondent all debts owed to it by the 2nd and 4th Respondents or its subsidiaries or associated companies in connection to the lease agreement and loans extended to the undisclosed "fellow subsidiaries; (*)

(c) that a certified public accountant be appointed to inspect the accounts of the 1st Respondent for the period beginning June 1995 to the date of this order, and to report to this Honourable Court of the results of the inspection; and

(d) costs arising out of this and occasioned by this Petition be borne and paid by the 2nd, 4th to 7th Respondents to the Petitioner.

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(* We were informed that it had been subsequently clarified with the court that the order as per (b) above ought not to have been entered since the petitioner had at the outset of the hearing of the petition abandoned that relief as originally sought.)

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[2] After having heard respective counsel we had unanimously allowed the appeal. There were two basic reasons underlying our decision. They were:

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(a) The petition here (commenced in 2006) had not been filed with necessary expedition or promptitude and the complaints raised by the petitioner no longer related to an ongoing state of affairs of the company such as would meet the requirements of s. 181(1)(a) of the CA, namely that, the "affairs of the company are being conducted or the powers of directors are being exercised ..." in an oppressive manner or in disregard to the interests of the shareholders; and

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(b) Grievances of the petitioner with regard to the losses arising from alleged use of the company's assets or non-recovery of monies due to the company or improper financial or accounting entries as to such matters (if at all), were wrongs (if at all) that caused 'loss' to the company. Any recovery or correction in the circumstances had to be at the instance of

the company or by way of derivative proceedings brought in the name of the company. Based on the 'reflective loss principle' a shareholder could not rely on any imputed diminution in value of the company's shares or likely impairment of profits or lower payment of dividends caused thereby, to seek any remedy independently on his own.

[3] The parties will be referred to here as they were at the High Court. The petitioner (Rinota Construction Sdn Bhd) had originally cited seven parties as respondents to the petition. However subsequently the petitioner discontinued the action against the third respondent (Yeoh Sek Phin).

[4] In this grounds, we have extracted and make reference only to such part of the respective party's story, claims and submissions as we found pertinent for our consideration and decision as aforesaid.

[5] It was not in dispute that the petitioner and the second respondent (Mascon Sdn Bhd) had in early 1995 agreed to carry out construction business through a joint venture company, the first respondent (Mascon Rinota Sdn Bhd) (the company). The issued and paid up capital in the company was held in the following proportions:

Second respondent : RM300,000 (300,000 shares)

Petitioner : RM200,000 (200,000 shares)

The second respondent was intended to be and was the controlling shareholder of the company at all material times.

[6] There was however no 'shareholders agreement' or 'joint venture agreement' entered into by the parties. Accordingly the relationship between the shareholders *inter se* and the operations of the company were solely dictated by the company memorandum and articles of association.

[7] One Richard Tankersley (RT) was the managing director and controlling shareholder of the petitioner.

[8] The second respondent was a subsidiary of the fourth respondent (Olympia Industries Berhad), a public listed company, which held 71% of the equity in the second respondent. The shareholders of the fourth respondent included the fifth respondent (Dato' Yap Yong Seong), members of his family and other companies allied to the fifth respondent.

[9] The fifth respondent was never a director of the company and neither of the second respondent.

[10] The sixth respondent (Yap Wee Keat) was the son of the fifth respondent. The sixth respondent was a director of the company until his resignation from the board on 6 September 1999. The Board of Director of the company thereafter comprised of:

(a) RT and one Ng Kwee Ying, as nominees of the petitioner; and

(b) The third respondent as the sole nominee of the second respondent (against whom, as earlier noted, this action had been discontinued)

Hence the majority of the members on the Board of Directors of the company post-September 2009 were representatives of the petitioner.

[11] The petitioner's narrative was that RT and the fifth respondent in discussion preceding the setting up of the joint venture business had an 'understanding' that at least five construction projects would be made available to the company, although admittedly the immediate objective was to carry out two projects in Malacca namely:

(a) the Casa Lago Condominium Project; and

(b) the Harbour Club Project.

[12] It was further claimed by the petitioner that there was an 'agreement' between the intending shareholders that, RT and the petitioner would be responsible for the construction aspects of the projects on a 'negotiated managing contractor cost plus basis'.

[13] The petitioner's specific complaints arising from the claimed 'understanding' was twofold, namely:

(a) That the further three projects allegedly promised were not secured or awarded to the company; and

(b) That, even in the case of the Casa Lago and Harbour Club projects, the contracts that were obtained by the company were the result of a competitive tender exercise.

[14] It was however not in dispute at all, that the Casa Lago and Harbour Club projects had been proceeded with and completed by the company way back in 1997. The said projects were for Olympia Land Berhad (OLB) (not to be confused with the fourth respondent – Olympia Industries Berhad). The Final Accounts related to the two said projects for OLB were signed of in January 1999.

[15] The petitioner did not also dispute that the arrangement between the shareholders has always been that the second respondent would arrange for all financing required by the company to execute the Case Lago and Harbour Club construction projects. In this regard, the petitioner further conceded that they were made fully aware that advances had been obtained from OLB (and other companies related to the second respondent) and that the petitioner had even agreed that the rate of interest payable on such borrowed funds was to be at 12% per annum.

It need to be mentioned here that OLB was not a named respondent in this petition.

[16] It is also relevant to make a note here that OLB as employer of the Casa Lago and Harbour Club projects had subsequently imposed a claim for liquidated and ascertained damages (LAD) as a result of the late completion of the projects (in the sum of RM500,000) which sum had been adjusted as against monies payable by OLB to the company in respect of those projects.

[17] The thrust of the petitioner's contention premised on the matters set out in the preceding paragraphs was that the second respondent as the majority shareholder had failed to honour the 'understanding' and the expectations of the petitioner for a long term collaboration through the joint venture. Counsel for the petitioner's submission in dramatic terms was that the company had however been left 'to die' by the respondents (who were related to the second respondent, the majority shareholder).

[18] The other complaints raised by the petitioner included in the main the following:

(a) Construction equipment, in particular two tower cranes, hoists and scaffoldings, which belonged to the company had been removed from the construction site and subsequently wrongfully disposed of by the second respondent. No commercial rent for the use in the meanwhile of those equipment by the second respondent or value for the same was received by or credited to the company.

(b) There had been manipulations of the accounts of the company which had been maintained and managed by the second respondent's staff at all times. The value of the company had gone down progressively from a positive position in 1997 into a negative state by 2004 although the company had no further business activity to post any likely losses.

(c) The company had been financially disadvantaged in that rental rates due for use of the company's machinery and equipment had not been fixed fairly and/or not booked in as income of the company at all. Further, although it had been agreed that lease payments for certain leased-equipment would be taken over and paid by the second respondent and thereafter the beneficial ownership of those leased items would pass to the second respondent, the second respondent had nevertheless raised debit notes for such lease payments as against the company; such debiting had also continued ever after all dues on the lease arrangement had been settled.

(d) The second respondent had unilaterally agreed to allow the LAD sum imposed by OLB without consultation or agreement of the petitioner and further this had been offset against the construction cost due from OLB to the company.

(e) Although the company had been forced to agree and pay high interest rates on financing obtained from second respondent or its related companies, no interest payment had been similarly imposed on monies due to company from the second respondent or its related companies.

[19] It is starkly obvious that the gist of the complaints listed out in para. 18 was that there were monies recoverable or due to the company and/or that the finances of the company as drawn up did not reflect the true and fair position of the company's financial state resulting from such inadequacies in accounting matters.

[20] As shown above there were two broad areas that formed the essence of the petitioner's complaints as a minority shareholder, namely:

(a) the non-award of further 'negotiated construction contracts' allegedly expected by the company; and

(b) those financial or accounting discrepancies which arguably meant that the audited annual accounts of the company as drawn up did not reflect the true value of or the proper financial state of the company.

Our Deliberations And Decision

[21] We must state at the outset that in our assessment the real issue in this case, even if the truth of those various complaints were established, was whether those facts amounted to 'oppressive' acts or 'conduct in disregard' to the petitioner's interest such as would be sufficient to warrant the granting of any relief under this petition brought under s. 181 of the CA. Findings may have been made by the learned judge hearing the petition on some of those issues of fact or there might even have been some admission made by the second respondent, but the basic question remained whether the existence of those facts *ipso facto* meant that the remedies under s. 181 of the CA should be granted to the petitioner as was done here by the High Court.

[22] It is not denied that the company ceased to be in active construction business from about 1997, that RT remained as a director of the company (and with another nominee of the petitioner even constituted the majority of the board subsequent to 1999), and, save for the limited reservations expressed by RT in 1997 as to the drawing up of the company's annual accounts (but he nevertheless signed the drafts) and a subsequent letter of complaint in 2004, there was total inaction on the part of the petitioner or on its behalf to pursue or assert the alleged 'contractual' expectations or the corporate rights to put right what is claimed to have disadvantaged the petitioner. This petition was only filed in 2006, some ten years after those matters complained of had first occurred or when it ought to have caused concern to the petitioner as a shareholder.

[23] The question of delay in filing the petition was of paramount importance in any consideration of the exercise of the court's discretion under s. 181 of the CA. This issue had been raised by the second respondent's counsel at the High Court but the learned judge, with respect, appears to have overlooked the significance of this lapse in the conduct of the petitioner.

[24] It is also pertinent to note that the petitioner *qua* shareholder of the company, was seeking for a 'buyout' of the petitioner's shares (*albeit* after it was revalued) by, not just the other shareholder of the company (the second respondent), but others who were not members of the company. The two principal relief sought were (as per the amended petition):

> (a) An order that the 1st Respondent and/or the 2nd Respondent to 7th Respondents do jointly and severally purchase the shares owned by the Petitioner in the Company at such price and terms determined by this Honourable Court; after making all necessary adjustments to the accounts of the Company to compensate for the acts and oppression of the Respondents;
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> (b) ...
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> (c) An order that a certified public accountant be appointed to inspect the accounts of the First Respondent for the period beginning June 1995 to the date of this order, and to report to this Honourable Court of the results of the inspection.

[25] It was trite that relief to be allowed under s. 181 of the CA was discretionary to be determined by the court upon equitable principles, inclusive as of necessity, the conduct of the parties taken in its totality. The petitioner here was also restricting the relief that was being sought to a forced buyout of their shares in the company which, admittedly for all intents and purposes, was a dormant entity as at the date the petition was filed.

[26] Section 181(1) and (2), in so far as was material for our consideration was in the following terms:

> 181. Remedy in cases of an oppression.
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> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:
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> (a) that the affairs of the company **are being conducted** or the powers of the directors **are being exercised** in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
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> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed **which unfairly discriminates** against or **is otherwise prejudicial** to one or more of the members or holders of debentures (including himself).
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> (2) If on such application the Court is of the opinion that either of those grounds is established **the Court may**, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may:

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(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company **by other members** or holders of debentures of the

B company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

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... (emphasis added)

[27] In the leading case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170; [1978] 2 MLJ 227, the Privy Council through Lord Wilberforce opined as follows:

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There are three particular points of direct relevance in the present appeal. First, it is claimed by the appellants that the section is not a substitute for a minority shareholders' action and, specifically, that many if not most of the matters complained of would properly form the subject of such an action. Their Lordships agree with this in part. Relief cannot be sought

E under section 181 merely because facts are established which would found a minority shareholders' action; the section requires (relevantly) "oppression" or "disregard" to be shown, and these are not necessary elements in the action referred to. But if a case of "oppression" or "disregard" is made out, the section applies and it is no answer to say that

F relief might also have been obtained in a minority shareholders' action. To the extent that the appellants so contend their Lordships do not accept their argument.

Secondly, for the case to be brought within section 181(1)(a) at all, the complaint must identify and prove: "oppression" or "disregard". The mere fact that one or more of those managing the company possess a majority

G or the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority or in disregard of their interests that the section can be invoked. As was said in a decision upon the United Kingdom

H section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v. Elder & Watson Ltd*): their Lordships would place the emphasis on "visible". And similarly "disregard" involves something more than a failure to take

I account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v. Drysdale*). Neither "oppression" nor "disregard" need be shown by a use of the

majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

Thirdly, in a number of United Kingdom decisions it has been held that for section 210 to apply the complainant must show oppression continuing up to the date of proceedings (eg. *In re Jermyn Street Turkish Baths Ltd*); where there has been oppression in the past, the section does not bite. Their Lordships agree that the wording of the section (and the same is true of section 181(1)(a)) relates to a present state of affairs: "are being conducted", powers "are being exercised" are grammatically clear: the language may be contrasted with that of section 181(1)(b) which refers to an act of the company which has been dome or threatened. But this argument must not be taken too far. What is attacked by sub-section (1)(a) is not particular acts by the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be "oppressive" or "in disregard" even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section.

[28] In *Re Senson Auto Supplies Sdn Bhd* [1987] 1 LNS 110; [1988] 1 MLJ 326 the learned judge (in a petition to wind up the company on just and equitable grounds) held that:

... I noted that the major matters complained about by the petitioners appear to have been spread out over a considerable period of time. It is settled law that delay by petitioners in initiating proceedings after they have realised that they have been victims of a scheme of oppression will induce the court to refuse relief, since this indicates that they have acquiesced in the conduct complained about and their complains are not therefore made in good faith (see *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All ER 184).

In the present case, there was inordinate delay in the presentation of the petition sufficient to debar the petitioners from relief by way of an order for winding up.

[29] Acting without expediency to protect or further one's rights when an alleged breach or violation of such right arose amounted to acquiescence, meaning acceptance of or consent to that situation. We found merits therefore in the submission of counsel for the respondents that the court should deny relief to an interested party who had sat on his rights and accepted tacitly such practices or decisions adopted by a company in its business affairs over time, but, who now wished to advance matters related to or arising therefrom as a grievance for relief under s. 181 of the CA. (see *Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & 13 Ors* [1993] 1 LNS 32; [1994] 1 MLJ 520).

[30] The observation of the Court of Appeal *In Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 (*supra*) germane to this point is reproduced below:

> We are concerned only to consider whether the affairs of the company were, when the petition was presented, being conducted in a manner oppressive to some part of the members of the company. ... Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor. If a director of a company were to draw remuneration to which he was not legally entitled or in excess of the remuneration to which he was legally entitled, this might no doubt found misfeasance proceedings or proceedings for some kind of relief, but it would not of itself amount to oppression. Nor would the fact that the director was a majority shareholder in the company make any difference, unless he had used his majority voting powers to procure or retain the remuneration of to stifle proceedings by the company or other shareholders in relation to it.

[31] There was no evidence in this instant appeal that the petitioner had been constrained in any way by the second respondent or the others cited, from advancing whatever complaints the petitioner might have had either within the company (for example: at board meetings) itself or otherwise, as are now being raised, some ten years later, in this petition seeking a buyout of the petitioner's shares in the company.

We were of the view that on this ground of delay in filing the petition alone, the petition ought not to have been allowed by the court.

[32] Accordingly, the question as to whether there even existed any 'understanding' to extend to the company a further three projects, was irrelevant and a non-issue. Further, it did not matter for the fair disposal of the petition, that the fifth and sixth respondents had failed to file any affidavit in response (and be subjected to be cross-examined on such deposition) as submitted by counsel for the petitioner. The ratio of the *Scottish Co-Operative Wholesale Society Ltd v. Meyer* [1959] AC 324 case, strenuously relied upon by counsel for the petitioner, was also of no assistance as unlike in that case, there was here no evidence of a complete diversion by the second respondent of the business already secured by the company to the second respondent or its related companies.

[33] Coming then to the other area of grievance of the petitioner, it was obvious that the substance of those complaints was that, had the financial records of the company been maintained properly, in that, receivables, like certain rental payments, had been properly booked in and if there had been no wrongful debits made or other manipulations done to the company's accounts by the second respondent or their agents, the company would have shown profits and be in positive territory rather than the negative value-state it was now in. In other words, the argument mounted was that 'losses' or

'damages' had been caused to the company's financial position by such omissions or acts, and consequently there had been occasioned a diminution of value in so far as the petitioner's shares (40%) in the company was concerned.

[34] In this regard, there is a well-established principle in corporate law that bars a shareholder from directly bringing or relying on 'losses' of the company to seek relief for himself unless by way of derivative action, namely proceedings brought in the name of the company. This was known as the 'reflective loss principle'. The principle applied where the shareholder's alleged loss was merely a reflection of the company's loss, such as where the shareholder's loss is a diminution in the value of his shares as a result of those alleged wrong to the company. In such situations, recovery by the shareholder of the loss he suffered is precluded, as this would mean making the wrongdoer liable for the same wrong twice over.

[35] This principle that it was the company that *prima facie* should act to recover any losses caused to it through a derivative action was succinctly captured in the judgment of the Court of Appeal in *Prudential Assurance Co Ltd v. Newman Industries Ltd (No 2)* [1982] 1 Ch 204 (at pp. 223, 224) in the following terms:

> But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participating, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company.

[36] This principle was further clarified by the learned author of the *Revised Third Edition of 'Walter Woon on Company Law'* (at p. 581) in the following manner:

> A difficult issue arising from the above type of cases is that the loss suffered by the minority shareholder is sometimes merely reflective of the loss suffered by the company. The general rule is that reflective loss is not recoverable, as the company is the proper plaintiff to bring an action against the wrongdoing controllers. Where no injury apart from injury to the company is shown, it is arguable that the minority shareholder ought to commence a common law derivative action or apply to court under s. 216A for leave to bring an action on behalf of the company, instead of

A proceeding under s. 216 to obtain corporate, rather than personal, relief. Further, even if it is permissible for the minority shareholder to seek corporate relief under s. 216, should not the proper order be to allow the minority shareholder to bring civil proceedings in the name of the company against the malfeasors under s. 216(2)(c), instead of granting relief directly under s. 216?

B

[37] Section 216 of the Singapore Companies Act is almost similar in terms to our s. 181 of the CA. The CA also have provisions which enable a derivative action to be brought by a shareholder in the name of the company, namely, s. 181A of the CA (equivalent to s. 216A Singapore Act). It must be noted however that there is no equivalent provision to s. 216(2)(c) of the
C Singapore Act, in our s. 181(2) of the CA. The Singapore provision was as follows:

(c) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;

D

In the absence of such additional provision in those terms in our CA, a shareholder having such complaints (of loss caused to the company) was limited to seek recourse through a separate derivative action brought pursuant to s. 181A of the CA.

E **[38]** This position in corporate law was affirmed by the Singapore Court of Appeal in *Townsing Henry George v. Jenton Overseas Investment Pte Ltd (In Liquidation)* [2007] 2 SLR 597 (at pp. 622 – 625) (although on the facts of that case it was not applied).The judgment made reference to the speech of Lord Millet in the House of Lords' case of *Johnson v. Gore Wood & Co*
F [2002] 2 AC 1 as follows:

75. The policy considerations behind the principle of reflective loss are clearly explained by Lord Millet in the following passage from his judgment in *Johnson*, at 62:

> The position is, however, different where the company suffers
G loss caused by the breach of duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. *If the shareholder is allowed to recover in*
H *respect such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders*. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests
I of the company's creditors requires that is the company which is allowed to recover to the exclusion of the shareholder, (emphasis added)

[39] The only exception to that rule was where the wrongdoer, by the breach of duty owed to the shareholder, had actually disabled the company from pursuing such course of action. In this case before the court, there was no evidence of any such restraint by the second respondent. The recourses available to the petitioner in such circumstances, in our considered view, was by way of derivative action brought under s. 181A of the CA to recover first monies due to the company and/or effect appropriate corrections to the company's financial statements. Another avenue that was open to the petitioner was to go for outright winding up of the company on just and equitable grounds. In the latter event, the liquidator is empowered to examine the company's account, investigate wrong doings, rectify errors in accounting and even bring needful proceedings against those that had caused the 'losses' to the company, (see ss. 300, 303, 304, 305, and 306 of the CA) including recovery action against delinquent officers or shareholders of the company.

[40] For the reasons discussed above there was no legal or sustainable basis, for the exercise of the court's discretion under s. 181 of the CA, to allow the petition and make the orders as was done in this case for a reassessment of the company's financial records/state and thereafter for a buyout of the petitioner's shares in the company by the second, fourth, fifth, sixth, and seventh respondents. We were therefore satisfied that this appeal warranted appellate intervention. We accordingly allowed the appeal with costs and set aside all the orders granted by the High Court.